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**IN THE  
COURT OF APPEALS OF INDIANA**

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LAWRENCE RAY HOLLEY,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 79A02-0510-CR-966

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APPEAL FROM THE TIPPECANOE CIRCUIT COURT  
The Honorable Donald L. Daniel, Judge  
Cause No. 79C01-0503-FA-6

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**August 30, 2006**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant-Defendant, Lawrence R. Holley (Holley), appeals his convictions for Count I, dealing in cocaine, as a Class A felony, Ind. Code § 35-48-4-1(a)(1); Count II, possession of cocaine, as a Class A felony, I.C. § 35-48-4-6(a); Count III, possession of marijuana, as a Class A misdemeanor, I.C. § 35-48-4-11; and Count IV, possession of cocaine paraphernalia, as a Class A misdemeanor, I.C. § 35-48-4-8.3(c)(1).

We affirm in part, reverse in part, and remand with instructions.

## ISSUES

Holley raises four issues on appeal, which we consolidate and restate as the following three issues:

- (1) Whether the trial court violated the principles of double jeopardy when it merged his conviction of Count I, dealing in cocaine, with the lesser-included conviction for Count II, possession of cocaine conviction, but failed to vacate the conviction for the lesser included offense;
- (2) Whether the trial court abused its discretion when it limited Holley's cross-examination of a State's witness about penalties the witness hoped to avoid on pending criminal charges by testifying against Holley; and
- (3) Whether the jury reached inconsistent verdicts.

## FACTS AND PROCEDURAL HISTORY

On March 12, 2005, the Lafayette City Police received an anonymous tip that Holley, who had an outstanding warrant, could be located at 1616 Rush Street in Lafayette, Indiana. The residence was located within 1,000 feet of a school and a public

park. In response to the tip, police arrived at the residence and spoke with Carrie Findley (Findley) as she exited the side door of the residence. As the officers talked with Findley, they heard a noise inside the side door. Then, another person, later identified as the owner of the residence, Bob Weber (Weber), appeared in the doorway. When officers questioned Weber about the noise, he admitted that placing his pistol on the kitchen table caused the noise. For officer's safety, Officer Wilson reached into the side door and pulled Weber outside, away from the gun. Upon searching Weber, Officer Wilson found cash, approximately 10 grams of cocaine, and a crack pipe.

While Officer Wilson detained Weber, another male ascended the basement stairs. The officer recognized the male as Holley, and ordered him to exit the residence. Holley complied, and officers arrested him on the outstanding warrant. During the search incident to the arrest, officers found 27.9 grams of cocaine on Holley's person. During the protective sweep of the home, police located five other people inside the residence along with drugs, paraphernalia, and scales.

Based on observations made during the protective sweep following Holley's arrest, officers obtained a warrant to search the residence. Upon searching the home, officers located a room in the basement that witnesses testified belonged to Holley. In the basement, police located items that included a bong and pipes for smoking cocaine, plastic baggies, 5 grams of cocaine in the ceiling tile, digital scales, and 1.8 grams of

marijuana in the room.<sup>1</sup> Police also found documents in the room containing Holley's name, including his birth certificate.

On March 15, 2005, the state filed an Information charging Holley with Count I, dealing in cocaine, as a Class A felony; Count II, possession of cocaine, as a Class A felony; Count III, possession of marijuana, as a Class A misdemeanor; Count IV, possession of paraphernalia (cocaine), as a Class A misdemeanor; Count V, possession of paraphernalia (marijuana), as a class A misdemeanor; and Count VI, maintaining a common nuisance, as a class D felony. On July 28, 2005, the State amended Count III, possession of cocaine, to allege that Holley possessed the cocaine within 1,000 feet of school property or a public park.

On August 3 and 4, 2005, the trial court conducted a jury trial. At the end of the trial, the jury found Holley guilty of Count I, dealing in cocaine, as a Class A felony, Count II, possession of cocaine, as a Class A felony, Count III, possession of marijuana, as a Class A misdemeanor, and Count IV, possession of cocaine paraphernalia, as a Class A misdemeanor. The jury hung on Count VI, maintaining a common nuisance, and found Holley not guilty of Count V, possession of marijuana paraphernalia.

On September 2, 2005, the trial court held a sentencing hearing and entered a conviction against Holley on Counts I, II, III, and IV. The trial court merged Count II, possession of cocaine, into Count I, dealing in cocaine, and sentenced Holley to forty

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<sup>1</sup> A bong, or water pipe, is a device used to smoke substances including, cannabis, tobacco, methamphetamine, and crack. <http://en.wikipedia.org/wiki/Bong>. Most bongs are designed to cool the smoke before it enters the operator's lungs, to build up a large buffer of smoke, which the user inhales quickly, or both. *Id.*

years for Count I. Additionally, the trial court sentenced Holley to one year for each of his misdemeanor convictions, and ordered all sentences to be served concurrently. The trial court suspended eight years of Holley's sentence and gave him 175 days credit, as well as 175 days for good time credit. On the State's motion, the trial court dismissed Count VI, maintaining a common nuisance.

Holley now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

### *I. Double Jeopardy*

Holley first argues, and the State concedes, that his conviction on Count II, possession of cocaine within 1,000 feet of a school or park, should be vacated. Specifically, Holley asserts that the trial court violated the "actual evidence test" under the double jeopardy clause of the Indiana Constitution. The trial court found Holley guilty of Count I and Count II, dealing in cocaine and possession of cocaine within 1,000 feet of school property, respectively, and merged both counts for sentencing purposes. Holley contends that the merger of the two convictions without vacating the lesser included offense does not cure the constitutional breach.

The Indiana Const. provides that a person may not be put in jeopardy twice for the same offense. Indiana. Const., Art. I, § 14. To show that two challenged offenses constitute the same offense under the actual evidence test applied under Art. I, § 14 of the Indiana Constitution, a defendant must demonstrate a reasonable possibility that the evidence used by the trial court to establish the essential elements of one offense may also have been used to establish the essential elements of the second challenged offense.

*Spivey v. State*, 761 N.E.2d 831, 832 (Ind. 2002). A double jeopardy violation occurs when judgments of conviction are entered and cannot be remedied by concurrent sentences or by merger after conviction has been entered. *Jones v. State*, 807 N.E.2d 58, 67 (Ind. Ct. App. 2004), *trans. denied*. Where the trial court merged two offenses, imposed one sentence, but entered judgment of conviction on both offenses, one of the offenses must be vacated to comport with double jeopardy. *Id.* The proper remedy when a defendant is found guilty of both the greater offense and the lesser-included offense is to vacate the conviction for the lesser-included offense and to enter a judgment of conviction and sentence only upon the greater offense. *Morrison v. State*, 824 N.E.2d 734, 742 (Ind. Ct. App. 2005), *trans. denied*.

In this case, the trial court recognized that the convictions for possession of cocaine and dealing in cocaine constituted the same offense for the purposes of double jeopardy. Accordingly, the trial court merged Count II, the lesser-included possession of cocaine conviction, with Count I, dealing in cocaine. Consequently, the trial court only sentenced Holley for Count I, dealing in cocaine; however, the trial court did not vacate Count II, possession of cocaine, as required to avoid a double jeopardy violation. Therefore, we remand this cause back to the trial court with instructions to vacate the conviction for Count II, possession of cocaine within 1,000 feet of school property.

## II. *Exclusion of Evidence*

Next, Holley argues that the trial court denied him the right to a full and fair cross-examination. Specifically, he argues that the trial court did not allow him to ask the

State's witness, Kerk Kerhoff (Kerhoff), about the potential penalties for crimes pending against him.

The decision to admit or exclude evidence is within the trial court's broad discretion, and is afforded great deference on appeal. *Sallee v. State*, 785 N.E.2d 645, 650 (Ind. Ct. App. 2003), *trans. denied*. Generally, we will not reverse a trial court's exclusion of evidence unless the exclusion is a manifest abuse of discretion resulting in a denial of a fair trial. *Morrison*, 824 N.E.2d 734 at 739. An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Williams v. State*, 779 N.E.2d 610, 612 (Ind. Ct. App. 2002). Moreover, this court will find an abuse of discretion when the trial court controls the scope of cross-examination to the extent that a restriction substantially affects the defendant's rights. *Id.*

Here, the trial court excluded testimony regarding Kerhoff's knowledge of sentencing penalties for Class C felonies when he only faced Class B felony charges. Holley alleges that human nature would indicate that Kerhoff, a co-defendant, had a willingness to say anything to ease his legal burdens and shift the blame to Holley. The exposure of a witness' motivation when testifying is a proper and important function of the constitutionally protected right of examination. *Jarrett v. State*, 498 N.E.2d 967, 968 (Ind. 1986).

In the present case, Holley directs our attention to two cases, *Samuels v. State* and *Hamner v. State*, to support his contention that limiting his ability to fully cross-examine Kerhoff affected his substantial rights. *Samuels v. State*, 505 N.E.2d 120 (Ind. Ct. App.

1987); *Hamner v. State*, 553 N.E.2d 201 (Ind. App. 1990). In *Samuels*, this court found that the trial court erred when it limited the defendant's ability to cross-examine a co-defendant, who proffered direct testimony against the defendant, about the penalties the co-defendant hoped to avoid by testifying against the defendant. *Samuels*, 505 N.E.2d at 124. This court reasoned that the importance of the co-defendant's direct testimony of the defendant's involvement, his prior inconsistent statement, and the general importance of accomplice testimony, constituted a reversible error. *Id.* Thus, we concluded that the trial court's limitation of the cross-examination required reversal because this court found that the error was not harmless. *Id.*

In *Hamner*, we ruled that the trial court erred when it limited the defendant's cross-examination of a witness concerning penalties the witness might receive for his testimony against the defendant. *Hamner*, 553 N.E.2d at 204. In *Hamner*, the defendant and co-defendant were charged with possession of marijuana and possession of cocaine. *Id.* at 202. The co-defendant pled guilty to possession of marijuana and the trial court dismissed the possession of cocaine charge. *Id.* at 203. Defense counsel attempted to question the co-defendant regarding the possible statutory penalty for possession of marijuana as a Class D felony, but the State objected. *Id.* The trial court sustained the objection reasoning that questions concerning penalties were inappropriate since the parties had not entered a written plea agreement. *Id.* This court found the trial court's refusal to allow the cross-examination was not harmless error. *Id.* at 204. We reasoned, as in *Samuels*, that the jury needed to be aware of the co-defendant's motivation for testifying; therefore, the error was not harmless. *Id.*



Both cases are inapposite to the case before us. Unlike the defendants in *Hamner* and *Samuels*, who were asked about charges actually faced, the record reveals here that the State charged Kerhoff with a Class B felony, not a Class C felony. Further, Kerhoff's testimony did not indicate that he thought he was facing a Class C felony, and none of the State's charges against him included Class C felonies. Only relevant evidence is admissible under the Indiana Rules of Evidence. Evid. R. 402. Holley's question regarding Class C felony penalties was not relevant. Therefore, we conclude that the trial court correctly excluded testimony regarding the Kerhoff's knowledge of Class C felony sentencing penalties.

Furthermore, even if the exclusion of evidence was error, it was harmless error. Errors in the admission or exclusion of evidence are to be disregarded as harmless unless the errors affect the substantial rights of the party. *Wilson v. State*, 770 N.E.2d 799, 802 (Ind. 2002). In the present case, limiting the ability to fully cross-examine Kerhoff is not an error, even though the jury is entitled to ascertain facts concerning a witness' motivation in testifying. From testimony offered at trial, the jury knew that Kerhoff faced charges for visiting a common nuisance and resisting law enforcement. Additionally, Kerhoff admitted that he was expecting some benefit from testifying against Holley. The jury also knew that the State provided Kerhoff with use immunity, precluding the use of his testimony at Holley's trial from being used against him in pending cases. Thus, the jury likely had sufficient facts concerning the circumstances of Kerhoff's testimony to evaluate his credibility and motivation for testifying.

Moreover, we also conclude that the State offered sufficient evidence independent of Kerhoff's testimony to prove that Holley dealt in cocaine and possessed cocaine paraphernalia. The State proved the charges against Holley through the testimony of other witnesses including Weber; Weber testified that Holley distributed cocaine and had equipment for dealing cocaine. Additionally, Holley told officers that he lived at the house where law enforcement officers found the contraband items, and Holley's birth certificate was also located in the house. Officers also found a substantial amount of cocaine in Holley's pocket, on the property owner, and in the basement. Based on the amount of cocaine, a detective from the drug task force testified that the combined amounts supported the inference that Holley intended to deal in cocaine.

Thus, Kerhoff's testimony only supplemented other evidence, and is not alone determinative. Thus, if limiting the testimony during cross-examination constituted error, it was harmless error. Therefore, we conclude that the trial court did not abuse its discretion by limiting the scope of cross-examination to the extent that the restriction substantially affected Holley's rights.

### III. *Inconsistent Jury Verdicts*

Lastly, Holley maintains that the jury's verdicts are impermissibly inconsistent. Specifically, he alleges that the verdicts are inconsistent because the jury found him guilty of dealing in cocaine and possession of cocaine paraphernalia, but did not find him guilty of maintaining a common nuisance. In particular, he asserts that the verdicts are wholly inconsistent with each other because the State relied on the same evidence for

each charge. Therefore, Holley argues that the convictions for dealing cocaine and possession of cocaine paraphernalia must be reversed.

However, our supreme court does not demand logical consistency in verdicts. *Hoskins v. State*, 563 N.E.2d 571, 577 (Ind. 1990). Only extremely contradictory and irreconcilable verdicts warrant corrective action. *Robinson v. State*, 814 N.E.2d 704, 709 (Ind. Ct. App. 2004). Moreover, jury verdicts do not have to be consistent in cases where one criminal transaction gives rise to criminal liability for separate and distinct offenses. *Id.* A jury's verdict may be inconsistent or even illogical but nevertheless permissible if it is supported by sufficient evidence. *Lampitok v. State*, 817 N.E.2d 630, 641 (Ind. Ct. App. 2004). Generally, where the trial results in acquittal upon some charges and convictions upon other, the results will survive a claim of inconsistency where the evidence is sufficient to support the convictions. *Id.* at 642.

Our courts have routinely made an effort to ensure that opposing verdicts on different counts can be rationally reconciled. *Owsley v. State*, 769 N.E.2d 181, 184 (Ind. Ct. App. 2002). Verdicts are inconsistent only where they cannot be explained by the weight and credibility assigned to the evidence. *Id.* Thus, an acquittal on one count does not require a reversal of a conviction on a similar count because the former will generally have at least one element (legal or factual) not required for the latter. *Id.*

In the present case, it should be noted that the jury did not reach a verdict on the charge of maintaining a common nuisance; the jury hung on the charge. Thus, we conclude that the jury did not reach an inconsistent verdict, so no corrective action is necessarily required. Further, we believe Holley's reasoning is flawed. Although the

counts are related, each count has at least one distinguishing element. The record clearly shows that Count I and Count IV differed in a factual element from Count VI, a common nuisance, which requires the state to show that the defendant maintained a structure used to unlawfully manufacturer, deliver, sell, use, or deliver controlled substances or items of drug paraphernalia. I.C. § 35-48-4-13. Under these circumstances, we can reasonably infer that the jury doubted the weight or credibility of the evidence presented in support of this distinguishing element, maintaining a common nuisance. *See Owsley v. State*, 769 N.E.2d at 184. Specifically, evidence was presented to establish that Weaver owned the residence and that Holley occupied the basement as a tenant. It is probable that the jury could not hold Holley responsible for “maintaining” the residence when Weber, the owner, knew of the activities and participated in them. As a result, we hold that the verdicts are not impermissibly inconsistent.

### CONCLUSION

Based on the foregoing, we conclude that (1) Holley’s convictions of, dealing in cocaine, and Count II, possession of cocaine, violate Article I, § 14 of the Indiana Constitution and remand to the trial court with instructions to vacate the conviction of possession of cocaine; (2) limiting Holley’s cross-examination of the State’s witness, concerning penalties the witness hoped to avoid by testifying, did not constitute a reversible error; and (3) the jury’s verdicts were not impermissibly inconsistent.

Affirmed in part, reversed in part, and remanded with instructions to the trial court to vacate Holley’s conviction on Count II.

VAIDIK, J., and DARDEN, J., concur.